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91-1767

IN THE SUPREME COURT
OF THE
UNITED STATES

Supreme Court, U.S.
FILED
MAY 1 1992
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JEAN PIERRE DeANDINO PETITIONER

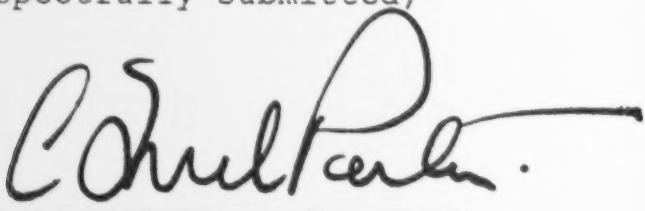
VS.

UNITED STATES OF AMERICA RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT
OF CERTIORARI

Respectfully submitted,



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QUESTION PRESENTED FOR REVIEW

Whether a violation of Title 18 USC Section 875(c) requires the prosecution to prove the Defendant possessed the specific intent to threaten another when he knowingly and willfully transmits a communication in interstate commerce

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IN THE SUPREME COURT
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JEAN PIERRE DeANDINO PETITIONER

VS.

UNITED STATES OF AMERICA RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The judgment and decision of the United States Court of Appeals for the Sixth Circuit was ordered published. A copy of the opinion may be found in Appendix A hereto. The Memorandum Opinion of the United States District Court for the Western District of Kentucky is also reproduced in Appendix A.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was rendered and filed March 3,

1992. This Petition for Writ of Certiorari was filed within 60 days of the decision of the United States Court of Appeals for the Sixth Circuit. Jurisdiction is therefore properly invoked pursuant to Title 28 United States Code Section 1254.

FEDERAL STATUTE INVOLVED

The Petitioner was named in a one count indictment alleging that he had violated Title 18 USC section 875 (c) by knowingly and willfully transmitting in interstate commerce, a communication containing a threat to another, to wit: that the Petitioner "was going to blow his (the victim's) brains out" and "he was going to die."

The Petitioner moved to dismiss the indictment as fatally flawed insofar as it failed to allege the Petitioner had the specific intent to threaten the

victim, i.e., that the threat was knowing and willful. The District Court requested the parties to file memorandum of law on the issue presented and, after considering such memorandums found that 18 USC Section 875(c) "defines a specific intent crime." Because the indictment failed to allege the Petitioner knowingly and willfully threatened the alleged victim the District Court dismissed the indictment as fatally flawed.

On appeal to the United States Court of Appeals the prosecution argued that 18 USC 875(c) defined only a general intent crime. The Sixth Circuit held 18 USC 875(c) did not create a strict liability offense yet neither did it create a specific intent offense. 18 USC Section 875(c) is a general intent offense. The District Court's dismissal of the indictment was held to be error.

ARGUMENT

The primary reason set forth in Supreme Court Rule 10 for granting a petition for a writ of certiorari is "when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter." The decision of the United States Court of Appeals for the Sixth Circuit conflicts directly with the decision of the United States Court of Appeals for the Ninth Circuit in U.S. v. Twine, 853 F.2d 676 (9th Cir. 1988).

The Ninth Circuit held that in order to obtain a conviction for a violation of 18 USC 875(c) the prosecution must prove that the Defendant possessed the specific intent to threaten the recipient of the communication. The Twine Court compared 18 USC 875(c) with a

related statute, 18 USC 876, which was enacted contemporaneously. Section 876 specifically contains the mens rea element of knowingly. Section 875(c) contains no mens rea element. Certainly this does not mean section 875(c) defines a strict liability offense. The mere fact that a statute does not specify any mention of the intent required does not eliminate that element from the crime. See Morisette v. U.S., 342 U.S. 246 (1952).

The Twine decision should be established as the authoritative interpretation of 18 USC 875(c). That decision vindicates the "true threat doctrine." That doctrine stands for the proposition that a communication does not violate 18 USC 875(c) unless it is a "true threat." A true threat is more than mere negative commentary on an issue of importance. It is more than idle

chatter, puffing or aimless boasting. The determination of what constitutes a true threat must be looked at from a subjective determination of the sender's intent, thus the requirement of specific intent is essential.

In U.S. v. Lincoln, 462 F.2d 1368 (6th Cir. 1972), the Sixth Circuit approved jury instructions construing 18 USC section 871(a) as requiring a Defendant to have the specific intent to make a threat against the President in order for a conviction. Without such instructions a Defendant could conceivable be convicted for a communication which was not a true threat, but was mere political commentary.

This Court in Watts v. U.S., 394 U.S. 705 (1969), overturned the conviction of a man for making a threat against the life of the President because

the threat was not a true threat, but merely political rhetoric. There a Defendant, having been classified as 1-A for the Vietnam draft, stated at a protest meeting "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Clearly this comment did not have the specific intent to threaten the life of the President and was not a "true threat."

The District Court's opinion found that under 18 USC section 875(a) the specific intent to extort is an essential element which must be pled in an indictment. U.S. v. Heller, 579 F.2d 990 (6th Cir. 1978). 18 USC Section 875(a) is no different structurally from 18 USC Section 875(c) and therefore the element of specific intent must also be inferred from the statute's silence regarding the required mens rea.

If the element of specific intent is removed from a prosecution under 18 USC 875(c) a criminal Defendant could conceivably be convicted for communicating something less than a true threat. The analysis by the Ninth Circuit Court of Appeals in U.S. v. Twine, 853 F.2d 676 (9th Cir. 1988), was a very well reasoned and compelling opinion, and one which this Court should adopt.

CONCLUSION

The United States Supreme Court should grant this Petition for a Writ of Certiorari in order to resolve the inconsistencies which have arisen between the Ninth and Sixth Circuit Court of Appeals.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA PLAINTIFF

VS. CRIMINAL ACTION NO. 90-00119-L(CS)

JEAN PIERRE DeANDINO DEFENDANT

MEMORANDUM OPINION

This matter is before the court for consideration of the motion of the defendant, Jean Pierre DeAndino, to dismiss the indictment.

This court ordered the parties to file a supplemental memorandum o flaw with respect to two issues:

1. Whether this court should adopt the reasoning of the Ninth Circuit Court of Appeals with respect to the elements of the crime defined by 18 USC section 875(c) as set forth in United States v. Twine, 853 F.2d 676 (9th Cir. 1988); and

2. The manner in which this Court should address the question of the

sufficiency of the indictment at bar, particularly in light of the analysis of a specific intent crime set froth in United States v. Heller, 579 F.2d 990 (6th Cir. 1978).

The defendant has been charged with violating 18 USC section 875(c). The indictment charges that the defendant "did knowingly and willfully transmit in interstate commerce between Washington, District of Columbia, and Louisville, Commonwealth of Kentucky, a communication containing a threat to injure Nelson Baker, to wit, that JEAN PIERRE DEANDINO was, 'going to blow his brains out' and he was 'going to die.'" The issue now before us is whether the indictment charges each essential element of the crime defined by 18 USC section 875(c). In order to make that determination, we must first decide whether that

statute defines a general intent or specific intent crime. As noted in our order of April 12, 1991, the United States Court of Appeals for the Sixth Circuit has not decided this precise issue, and there is a split of authority on the matter among courts of other jurisdictions.

The parties have pointed to the Sixth Circuit case of United States v. Ring, 513 F.2d 1001 (6th Cir. 1975), for guidance. Ring involved a prosecution for mailing threatening letters in violation of 18 USC section 876. The parties are in agreement that our decision with respect to section 875(c) may be guided by decisions interpreting section 876, a companion statute which is very similar in structure. The United States asserts that Ring stands for the proposition that section 8976 is a general intent crime. The defendant disagrees with this reading

of the case.

The court finds that the Ring case is of little help in the matter. The Sixth Circuit stated that:

> The dispositive issue is whether this evidence of prior threats was admissible to show the accused's criminal intent. We hold that it was not, and that evidence that the accused had made threats in the past was inadmissible under the "intent" exception to the general rule excluding evidence of prior misconduct. Although intent is an element of the offense charged in the indictment, intent was not a genuinely contested issue in the case because appellant had not asserted a mistake or an innocent state of mind as a defense. When no such defense is asserted, the element of intent may be inferred from the act of mailing but may not be proved in the prosecution's case in chief by similar act evidence.

Ring, 513 F.2d at 1003. The court stated that intent was an element; however, it did not indicate whether the required intent was specific or general. It is

unclear whether the intent to which it was referring was an intent to mail or an intent to threaten. An item might be placed in the mails by mistake or carelessness. Conversely, a person might mail a threatening communication to another without intending to actually threaten that individual, for instance as a joke (albeit a sick joke).

Ring dealt with the admissibility of certain evidence in the context of Fed.R.Evid. 404(b) and spoke only in general terms about proof of intent. The court noted that the element of intent may be inferred from proof of the act charged. We cannot determine from the text of the case whether an intended mailing of a letter containing a threat is all that is required for conviction under section 876 or whether a defendant must have intended to threaten a victim by mailing the letter.

We conclude that 18 USC section 875(c) defines a specific intent crime. As an essential element, the defendant must be found to have intended to threaten a victim. In the context of this case, the jury must be convinced beyond a reasonable doubt that the defendant intended to threaten Nelson Baker in order to convict. See United States v. Twine, 853 F.2d 676 (9th Cir. 1988); United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976). As established by Ring, specific intent may be inferred from proof of the act charged when that element is not controverted by the defendant. Otherwise, 404(b) evidence may be probative of intent.

Here, the indictment fails to charge all elements of the crime. A sufficient indictment under 18 USC section 875(c) must charge that the defend-

ant knowingly and willfully threatened or intended to threaten. This indictment charges only that the defendant knowingly and willfully transmitted a communication containing a threat. In United States v. Heller, 579 F.2d 990 (6th Cir. 1978), an indictment under a similar statute, 18 USC section 875(a), charged the knowing and willful transmission of a communication containing a demand for ransom. The court of appeals found that section 875(a) requires an intent to extort as an essential element of the crime. The indictment was found to be insufficient. Because there is no palpable difference in structure between section 875(a) and section 875(c), we believe the reasoning of Heller must be applied to reach the conclusion that the indictment here is deficient in failing to charge intent to threaten.

We hold that the indictment

must be dismissed. A separate order will be entered this date in accordance with this opinion.

This 17th day of July, 1991.

CHARLES R. SIMPSON III
U.S. DISTRICT JUDGE

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA PLAINTIFF

VS. CRIMINAL ACTION NO. 90-00119-L(CS)

JEAN PIERRE DeANDINO DEFENDANT

ORDER

Motion having been made by the defendant, Jean Pierre DeAndino, to dismiss the indictment, and for the reasons set forth in the memorandum opinion entered herein this date, and the court being otherwise sufficiently advised; IT IS HEREBY ORDERED AND ADJUDGED that the motion of the defendant, Jean Pierre DeAndino, is GRANTED and the indictment is DISMISSED.

There being no just reason for delay in its entry, this is a final order.

This 17th day of July 1991.
CHARLES R. SIMPSON, III
U.S. DISTRICT JUDGE

cc: Counsel of Record

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-5895

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JEAN PIERRE DEANDINO,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Western District of Kentucky

---

Decided and Filed March 3, 1992

Before: MARTIN and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge. The appellant, the United States of America, contests the district court's dismissal of the indictment as insufficient. The indictment alleged that appellee, Jean Pierre DeAndino, violated 18 U.S.C. § 875(c) because he "did knowingly and willfully transmit in interstate commerce . . . a communication containing a threat to injure." For the following reasons, we reverse the decision of the district court and find that the indictment is sufficient.

I.

On November 19, 1990, an indictment was returned in the United States District Court for the Western District of Kentucky, charging appellee, Jean Pierre DeAndino, with violation of 18 U.S.C. § 875(c). The indictment read as follows:

> On or about the 21st day of October, 1990, in the Western District of Kentucky, Jefferson county, Kentucky, and elsewhere, JEANE PIERRE DeANDINO, defendant herein, did knowingly and willfully transmit in interstate commerce between Washington, District of Columbia, and Louisville, Commonwealth of Kentucky, a communication containing a threat to injure Nelson Baker, to wit, that JEAN PIERRE DeANDINO was, "going to blow his brains out" and he was "going to die."
>
> In violation of Title 18, United States Code, Section 875 (c).

The indictment tracked the language of the statute, 18 U.S.C. § 875(c), which reads as follows:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Appellee moved to dismiss the indictment as flawed, because it did not allege that he possessed a specific intent to threaten. The district court found that the indictment was flawed and dismissed it. The district court held that section 875(c) "defines a specific intent crime," and an indictment for such a crime "must charge that the defendant knowingly and willfully threatened or intended to threaten." Joint Appendix at 9-10. The court found that the indictment charging DeAndino was insufficient,

because it "charges only that the defendant knowingly and willfully transmitted a communication containing a threat." *Id.*

The United States timely appealed the dismissal, arguing that section 875(c) defines a general intent crime, not a specific intent crime, in regard to the threat element of the offense, and the indictment was therefore sufficient.

II.

An indictment is sufficient if it "set[s] forth the offense in the words of the statute itself, as long as 'those words . . . fully, directly, and expressly . . . set forth all the elements necessary to constitute the offense intended to be punished.'" *Hamling v. United States*, 418 U.S. 87, 117 (1974). A criminal statute such as 18 U.S.C. § 875(c) does not contain a specific mens rea element. However, such a statute is not presumed to create a strict liability offense, because "mere omission [from the statute] of any mention of intent will not be construed as eliminating that element from the crime denounced." *Morissette v. United States*, 342 U.S. 246, 263 (1952). In other words, the prosecution bears the burden of proving that the defendant "*knowingly* committed an act which the law makes a crime." *United States v. Bailey*, 444 U.S. 394, 407 (1980).

In the present case, the indictment tracked the statutory language and stated that it is a crime to "transmit in interstate commerce . . . a communication containing a threat" and added the words "knowingly" and "willfully" before the word "transmit" to indicate that the defendant's act must be "knowing" -- in other words, he cannot be prosecuted for mistakenly or inadvertently transmitting a communication containing a threat to injure.

There are three elements of the offense defined by 18 U.S.C. § 875(c). There must be: (1) a transmission in interstate commerce; (2) a communication containing a

threat; and (3) the threat must be a threat to injure the person of another.

The issue in the present case is whether the second element -- "the communication containing a threat" -- requires general intent or specific intent. If the statute contains a general intent requirement in regard to the threat element of the offense, the standard used to determine whether or not the communication contained an actual threat is an objective standard, i.e., would a reasonable person consider the statement to be a threat. If the statute contains a specific intent requirement, the standard is a subjective standard, i.e., did the particular defendant have the subjective knowledge that his statement constituted a threat to injure and did he subjectively intend the statement to be a threat.

In regard to the present case, if the threat element of section 875(c) has a mens rea requirement of general intent, whether the communication is a "true threat," and hence criminal, would not be determined by probing DeAndino's subjective purpose, but instead would be determined objectively from all the surrounding facts and circumstances. *See United States v. Vincent*, 681 F.2d 462, 464 (6th Cir. 1982) (applying "objective" standard under which inquiry in section 871 threat prosecutions is whether a reasonable person would have taken the defendant's statement as "a serious expression of an intention to inflict bodily harm"); *United States v. Lincoln*, 462 F.2d 1368, 1369 (6th Cir.) (in rejecting argument that section 871 requires that a defendant have willfully intended to carry out the threat, court agreed with all other circuits that statute applies where the "defendant intentionally make[s] a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression" of a threat to injure), *cert. denied*, 409 U.S. 952 (1972).

If the statute at issue in the present case has a heightened mens rea requirement of specific intent in regard to the threat element of the offense, the question of whether or not the alleged threat is a "true threat" would be determined by probing DeAndino's subjective purpose in making the statement. The district court found specific intent was required, and that in order to properly designate the elements of the offense, the indictment would have to specify that the defendant *knowingly* threatened his victim. We disagree with the district court's conclusion that section 875(c) requires specific intent.

In *United States v. Brown*, 915 F.2d 219, 225 (6th Cir. 1990), this court has taken the position that "a general rule of construction of criminal statutes provides that where a statute does not specify a heightened mental element such as specific intent, general intent is *presumed* to be the required element" (emphasis added). According to the rationale of *Brown*, because the language of section 875(c) does not expressly require a heightened mental element in regard to the "communication containing a threat," it is presumed that the statute requires general intent. Although *Brown* did not deal with a statute containing a threat, the presumption we articulated in *Brown* that unless there is evidence to the contrary, criminal statutes require general intent is in accord with other courts that have analyzed statutes containing a "threat" as an element of the offense. *See United States v. Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974) (a conviction under 18 U.S.C. § 875(c) requires proof that the threat was made knowingly and intentionally), *cert. denied*, 422 U.S. 1044 (1975); *United States v. LeVison*, 418 F.2d 624, 626 (9th Cir. 1969) ("a general intent to threaten is an essential element of the crime"); *United States v. Holder*, 302 F. Supp. 296, 300 (D. Montana 1969) (it is sufficient to establish knowing intent to *communicate* a threat to injure), *aff'd by*, 427 F.2d 715 (9th Cir. 1970).

In regard to the present case, although a general intent to threaten is an essential element of the offense, *see United States v. LeVison*, 418 F.2d at 626, there is nothing in the language of the statute or legislative history to indicate that Congress intended that there be a heightened mens rea requirement in regard to the threat element or to indicate that the prosecution has to prove a specific intent to threaten based on the defendant's subjective purpose. Therefore, the rationale of *Brown* that criminal statutes are presumed to require general intent applies.

For this reason, the district court erred in finding that in addition to stating a knowing intent to transmit a communication containing a threat, the indictment also had to indicate a specific intent to threaten. The district court relied on a Ninth Circuit opinion, *United States v. Twine*, 853 F.2d 676 (9th Cir. 1988), in reaching this conclusion. We find that the reasoning of *Twine* is flawed. The *Twine* court held that a specific intent requirement is necessary in regard to the threat element of section 875(c) in order "to insure that a defendant would not be convicted for an act because of mistake, inadvertence, or other innocent reason." *Id.* at 680. However, these defenses may be raised for crimes of general intent as well as for crimes of specific intent. Even if a statute containing the word "threat" has only a general intent requirement, the prosecution must still prove that the threat is a "real threat" as opposed to a mistake or inadvertant statement. Moreover, the reasoning in *Twine* that a heightened mens rea element is required is contrary to the presumption of this circuit in *United States v. Brown* that a criminal statute requires general intent unless there is specific evidence to the contrary in the statute or legislative history. The district court also believed the present case was controlled by this court's decision in *United States v. Heller*, 579 F.2d 990 (6th Cir. 1978). We do not agree. *Heller* involved 18 U.S.C. § 875(a), which defines a crime separate and distinct from that defined in § 875(c), and did not address the issue of specific intent to threaten.

The district court also stated that because intent is a vital issue in a prosecution under section 875(c), it logically follows that there must be a specific intent to threaten. Although the issue of whether or not DeAndino's alleged threat is a "real threat" will be a vital one in a prosecution under § 875(c), it is a vital issue regardless of whether specific intent or general intent is required. The difference between a specific intent and general intent crime involves the way in which the intent is proved -- whether by probing the defendant's subjective state of mind or whether by objectively looking at the defendant's behavior in the totality of the circumstances. *See United States v. Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986) (government must establish that a "true threat" was made under such circumstances wherein a reasonable person would perceive that the statement would be interpreted as a threat), *cert. denied*, 481 U.S. 1005 (1987).

To conclude, we believe the district court erred in holding that a sufficient indictment under 18 U.S.C. § 875(c) must charge that the defendant "knowingly and willfully threatened or intended to threaten." Specific intent is not an express element of section 875(c) according to the plain words of the statute. The general intent presumed by this court in *United States v. Brown* to be required for a violation of most criminal statutes is sufficiently indicated in the indictment as it now stands, which tracks the language of the statute. Therefore, the judgment of the district court is hereby REVERSED. Section 18 U.S.C. § 875(c) does not require specific intent in regard to the threat element of the offense, but only general intent. The case is REMANDED to the district court for proceedings consistent with this opinion.